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# In the Supreme Court of the United States

OCTOBER TERM, 1984

REYNARD JOHN ROCHON, SR.,

PETITIONER

VERSUS

DENNIS WOLTER, JIM BOYER, WWL-TV, CHANNEL 4, LOYOLA UNIVERSITY AND UNKNOWN INSURANCE COMPANY

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

## RESPONDENT'S BRIEF IN OPPOSITION

THOMAS A. RAYER
DENECHAUD AND DENECHAUD
1412 PE E MARQUETTE BLDG.
NEW ORLEANS, LA 70112
PHONE: (504) 522-4756

ATTORNEY FOR RESPONDENT

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the decision below conforms to this Court's decisions, emanating from *New York Times v. Sullivan,* and its progeny, particularly *Gertz v. Robert Welch, Inc.,* regarding the burden of proof on Plaintiff in a public figure libel case required to overcome summary judgment?

Specifically, whether the *Times-Gertz* series of decisions affords a First Amendment defense against defamation actions for expressions of opinion about matters of public concern made without knowing or reckless falsity and otherwise factually true?

2. Whether the Louisiana qualified privilege statute (R.S. 45:1452) as applied below, is consistent with this Court's prior holdings, especially *Caldwell v. United States,* 434 F.2d 1084 (CA9 1970) *cert. granted* 402 U.S. 942, 91 S.Ct. 1616, 29 L.Ed.2d 109; and *Cervantes v. Time, Inc.,* 464 F.2d 986 (1972) *cert. den.* 409 U.S. 1125 and *Herbert v. Lando,* 441 U.S. 153, 60 L.Ed.2d 115, 99 S.C. 1635 (1979)?

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# RESPONDENT'S BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF THE CASE

This suit by the Chief Administrative Officer of the City of New Orleans, Reynard Rochon, centers around a news story broadcast by the Defendant television station on November 1, 1982.

The story related to a Federal Grand Jury investigation of allegations of extortion by "some public officials or businessmen" involving transactions with the New Orleans City Administration.

The newscast began by stating that, "Sources say the probe is in such a preliminary stage it would be inaccurate to call anyone a target, but our sources say at least three officials are being investigated...City Councilman Jim Singleton, Chief Administrative Officer and Mayor's top aide, Reynard Rochon, etc..."

The newscast then portrays an abortive interview with the Petitioner Rochon on the steps of the Federal Courthouse, taped earlier that day, in which Petitioner repeatedly refused to discuss or comment on the Grand Jury investigation, or his testimony or involvement therein. The story concludes with the reporter's comment that:

"The Grand Jury has a lot of suspicions. It's investigating various episodes of alleged public extortion, some of which may involve the City Administration; but, so far, our sources stress there are no direct allegations against Mayor Morial."

Attempts by the Respondent television station to obtain further comment from the Petitioner prior to the broadcast proved futile and only after the first two airings at 5:00 and 6:00 p.m. on that day was the reporter able to reach the Petitioner. When questioned at that time, he merely stated that he was not a subject of the investigation, but only a witness.

## SUMMARY OF ARGUMENT

The decision of the Louisiana Court of Appeals, which the Supreme Court of Louisiana declined to review, is entirely consistent with this Court's prior holdings in public figure defamation cases.

Petitioner misreads the Court's holding to suggest that it has placed the burden on him of, "totally proving his case at trial of the motion (for Summary Judgment) as though he were proving it at trial on the merits." (Petitioner's Brief pg. 12).

To the contrary, the decision below merely applies the established jurisprudence to the facts and concludes that Petitioner failed to either plead or demonstrate that the statements of fact or opinion regarding him were either false or made with malice.

The only elements of the broadcast about which Petitioner complains are expressions of opinion. Therefore, the issue of malice becomes irrelevant, since, before the test of reckless or knowing falsity can be met, there must first be a false statement of fact, and in the instant case, none was made.

Petitioner further urges the Court to review the Trial Court's application of the Louisiana reporter's privilege statute to the case at bar. He argues that its application is contrary to this Court's holding in *Herbert v. Lando, supra.*

Respondents respectfully suggest that the ruling of the Trial Court staying pre-trial taking of the reporter's deposition was in conformity with the ruling of the Court in *Herbert v. Lando, supra,* in that no showing was made as to the relevance of his testimony to the merits of plaintiff's case, c.f. 441 U.S. 132.

## ARGUMENT

### I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND *NEW YORK TIMES V. SULLIVAN* AND ITS PROGENY REGARDING PLAINTIFF'S BURDEN OF PROOF AND THE GRANTING OF SUMMARY JUDGMENT.

In *Letter Carriers v. Austin*, 418 U.S. 264, 41 L.Ed.2d 745, 94 S.Ct. 2770 (1974) this Court unequivocally held that, "before the test of reckless or knowing falsity can be met, there must be a false statement of fact", and thusly refused to apply the test to a mere expression of opinion.

The Louisiana Supreme Court, in recognition of this First Amendment principle, concluded in *Mashburn v. Collin*, 355 So.2d 879 (1977) that:

> "The logical inference to be drawn from the language and the Court's analysis in these cases is that mere opinion expressed on matters of public concern cannot be the basis of a defamation action. If the First Amendment requires that we protect some falsehood in order to protect speech that matters, then surely the First Amendment must also protect the expression of opinion in order to foster uninhibited, robust and wide open debate on public issues." 355 So.2d, at pg. 884. (c.f. *Letter Carriers v. Austin*, 418 U.S. at 340, 94 S.Ct. at 3007, 41 L.Ed.2d at 805; *Economy Carpets v. B.B.B*, 361 So.2d 234.

The Louisiana Court of Appeals, citing *Mashburn, supra*, in granting summary judgment herein to Respondents, essentially held, on the basis of the record

below, that the Petitioner herein, "has not shown that the reports were: (1) false, and (2) that defendants either knew the statements contained in the reports were false or acted with a reckless disregard of the truth." (c.f. Petitioner's Brief, Appendix "G", pg. A-9)

Petitioner takes no issue with the essential factual statements contained in the newscast. It is unquestioned that the Grand Jury probe centered around a pending investigation of top New Orleans City Officials. It is unquestioned that Petitioner did appear and testify before the Grand Jury, and upon leaving the Courthouse, declined to comment on the nature of his testimony or his role in the investigation.

Mr. Rochon's tight-lipped evasion of the media on the courthouse steps following his Grand Jury appearance is perhaps the best mute evidence of the reasonableness of the respondent station's expression of opinion regarding petitioner's role in this ongoing investigation. Petitioner was under no legal constraint which would have prevented him from openly expressing his appreciation of his role as being only a "witness" and not a "subject" or "target" of the investigation, for "in the absence of any specific restraint, a Grand Jury witness is at all times free to discuss his testimony outside the jury room. *King v. Jones*, 319 F.Supp. 653 (N.D. Ohio 1920); *In Re Russo*, 53 F.R.D. 564 (E.D.Col. 1971); *Iselin v. Ideal Carpets*, 510 F.Supp. 343 (D.C. Ga. 1980).

Petitioner could have therefore easily overcome any adverse inference or innuendo suggested from the opinions and conjecture expressed by the defendant station by simply taking advantage of the opportunity afforded him by Respondent to exculpate himself. This, however, he chose, for his own reasons, not to do.

As this Court observed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 945 S.Ct. 2997, 41 L.Ed.2d 789 (1974) "The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *id.* 118 U.S., at pg. 344, 94 S.Ct., at pg. 3009.

Petitioner nevertheless urges the Court to find malice on the part of the Respondent station solely on this basis of its characterization of him as being a possible subject of the Grand Jury investigation, absent any substantial or reliable information to the contrary prior to the newscast in question.

Viewed in even its most unfavorable light, the reference to Petitioner being a possible "subject" or "target" of the Grand Jury probe, in addition to being a mere expression of opinion, can properly be characterized as what this Court has referred to as "rhetorical hyperbole". *Greenbelt Cooperative Pub. Assoc. v. Bresler*, 398 U.S. 6, 26 L.Ed.2d 6; 90 S.Ct. 1537 (1970).

Moreover, Mr. Justice White, in his concurring opinion in *Greenbelt, supra*, observed that:

> "Although the Court does not so hold, arguably the newspaper should not be liable if it had no intention of charging a crime and had a good faith, non-reckless belief that it was not doing so." (398 U.S. at pg. 22).

Other decisions of the several circuits have reaffirmed the principle that, "*New York Times*, in its application, does not interdict legitimate or normal hyperbole."

*Time, Inc. v. Johnston*, 448 F.2d 378 (1971); *Sellers v. Time, Inc.*, 299 F.Supp., at pg. 585.

Moreover, Petitioner would impose a greater burden of inquiry on Respondent beyond that undertaken prior to the newscast to confirm the opinions expressed therein. This Court has rejected the imposition of any such burden in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323 So.2d L.Ed.2d 262 (1968).

## II. THERE IS NO CONSTITUTIONAL QUESTION INVOLVED HEREIN RELATIVE TO THE APPLICATION OF LA. R.S. 45:1452, *ET. SEQ.* BY THE COURT BELOW, AND NO CONFLICT THEREOF WITH THIS COURT'S DECISION IN *HERBERT V. LANDO.*

Petitioner argues that the Trial Court's application of the state conditional privilege statute which operated to delay the taking of the Respondent Wolter's deposition prevented him from making inquiry into the sources of the reporter's information concerning some aspects of the newscast in question in order to prove malice.

Petitioner's argument in support thereof is doubly flawed. Firstly, as previously discussed herein, the Court below found that Petitioner failed to either allege or establish facts which made a *prima facie* showing of falsity.

Secondly, Petitioner totally failed to articulate, by either pleading or evidence at the hearing on summary judgment, that the identity of the reporter's source was critical to his case. *Cervantes v. Time, Inc., supra; Carey v. Hume*, 492 F.2d 631 (1974). As the Court observed in *Cervantes, supra*:

> "The point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error. Mere speculation or conjecture about the fruits of such examination simply will not suffice."

The Fifth Circuit Court of Appeals has given recognition to this same principle of First Amendment privilege in the case of *In Re Selcraig,* 705 F.2d 789 (5th Cir., 1980) in the following language:

> "We have recognized that the First Amendment shields a reporter from being required to disclose the identity of persons who have imparted information to him in confidence. *Miller v. Transamerican Press,* 621 F.2d 721 (5th Cir.), *modified on rehearing,* 628 F.2d 932 (5th Cir. 1980), *cert. denied,* 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 238 (1981). Our course was dictated by our careful reading of the plurality and concurring opinions in *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). The privilege, we held, is not absolute, but qualified. In libel cases, it can be overcome, but only if the party who seeks disclosure of the identity of a confidential informant establishes by substantial evidence that the statement attributed to the informant was published and is both factually untrue and defamatory; that reasonable efforts have been made to learn the identity of the reporter's informant by alternative means; that no other reasonable means is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case. *Miller,* 628 F.2d at 932."

The instant case presents First Amendment issues

similar to those confronting the Court in *Cervantes v. Time, Inc., supra.*

Initially, the *Cervantes* Court determined that, if the publication was made in good faith, without actual malice and, "without regard to the identity of the news source, there is no rule of law or policy consideration of which we are aware that compels compulsory revelation of news sources." *id.* at 464 F.2d, pg. 495. The Court then concluded that:

> "Nevertheless, on the facts of this particular case, we believe that in his preoccupation with the identity of Life's news sources, the Mayor has overlooked the central point involved in this appeal: that the depositions and other evidentiary materials comprising this record establish, without room for substantial argument, facts that entitled both defendants to judgment as a matter of law, viz., that, quite apart from the tactics employed in collecting data for the article, the Mayor has wholly failed to demonstrate with convincing clarity that either defendant acted with knowing or reckless disregard of the truth." *id.* at pg. 992.

Finally, the Louisiana courts have heretofore reviewed the statute in question, and have found it to be not inconsistent with this court's prior decisions.

In *Dumez v. Houma Mun. Fire & Police Civ. Serv. Bd.*, 341 So.2d 1206 (La. App., 1976), *writ denied*, 344 So.2d 667, the Court determined that:

> "Moreover, our statute accords with the holding in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct.

2646, 33 L.Ed.2d 626, which held that the United States Supreme Court lacked authority to prevent state courts from construing their respective constitutions so as to recognize a newsman's privilege, either qualified or absolute, and from further declaring that within the limitations of the First Amendment of the United States Constitution, state legislatures are free to establish their own standards governing the relationships between law enforcement officials and the press."

## CONCLUSION

Nothing contained in the reported decisions below is contrary to the established jurisprudence of this court.

Essentially, the Louisiana courts, in applying the *Times-Gertz* test, found no false statement of fact was made by the Respondenat station or reporter, nor was there any evidence produced by the Plaintiff to indicate malice on their part, as that term has been defined by this court.

Petitioner, a public figure involved in an obvious matter of public concern, would have the Court apply the test of falsity not only to statements of fact, but also to comments or expressions of opinion made by the media concerning those facts. It is respectfully suggested that the protection this court has afforded the media in reporting such matters necessarily precludes any such inquiry as forming the basis for an action in defamation.

Petitioner further fails to demonstrate any prejudice to his case by reason of his inability to depose the Respondent reporter prior to summary judgment being rendered. The Court having found no falsity in the news story, the

issue of motive, or suspected disregard of the truth, therefore becomes irrelevant. Furthermore, Petitioner not only failed to allege any facts upon which a conclusion of malice could be inferred through the disclosure of sources of information, but the uncontradicted series of events giving rise to the story are themselves adequate to negate any inference of serious doubt of the veracity of the story.

For the foregoing reasons, Petitioner's application for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS A. RAYER
DENECHAUD AND DENECHAUD
1412 PERE MARQUETTE BLDG.
NEW ORLEANS, LA 70112
PHONE: (504) 522-4756

## CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing brief have been forwarded to opposing counsel by depositing same in the United States mail, postage prepaid on this 18th day of July, 1984.

THOMAS A. RAYER